

Appendix F

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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING
LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S
OBJECTIONS TO DEFENDANTS' RULE
26(a)(3) WITNESS LIST**

1 Plaintiff Waymo LLC (“Waymo”) hereby objects to the following witnesses on
 2 Defendants’ Uber, Ottomotto, and Otto Trucking’s respective witness lists.

3 **Seval Oz (Otto Trucking’s Witness List):** Otto Trucking discloses Seval Oz as a trial
 4 witness to testify “about Waymo’s disclosures of its purported trade secrets. She will authenticate
 5 earrings that were made out of certain printed circuit boards.” Waymo objects to Ms. Oz as a trial
 6 witness because the full scope of her testimony falls within Waymo’s Motion *In Limine* No. 16 to
 7 preclude any argument, testimony, or evidence about earrings that were not disclosed to Waymo
 8 until August 22, 2017. (Dkt. 1556-0.) As set forth in Waymo’s Motion *In Limine*, late-produced
 9 text messages make clear that Anthony Levandowski solicited this “evidence” from Ms. Oz, and
 10 then it ended up in the hands of Otto Trucking’s counsel who did not produce it to Waymo before
 11 using it at a deposition two days before the close of fact discovery. (*Id.*) Defendants should be
 12 precluded from relying on this evidence that was obtained from Levandowski and that was not
 13 appropriately disclosed in discovery for the reasons set forth in Waymo’s Motion *In Limine*. (*Id.*)
 14 Given that the subject matter of Ms. Oz’s expected testimony should be precluded, Otto Trucking
 15 should not be permitted to rely on Ms. Oz’s testimony at trial.

16 **Waymo’s Experts Michael Wagner, Lambertus Hesselink, Gregory Kintz, Paul**
 17 **French, Bruce Hartley, and Jim Timmins (Uber’s Witness List):** Uber discloses on its
 18 Witness List the five expert witnesses who submitted expert reports on Waymo’s behalf and upon
 19 whom Waymo intends to rely at trial (Wagner, Hesselink, Timmins, French, and Hartley)¹, as well
 20 as the expert upon whom Waymo relied during the preliminary injunction phase (Kintz) and upon
 21 whom Waymo does not intend to rely at trial. Uber should not be permitted to call Waymo’s
 22 experts as witnesses in Uber’s case because doing so would be unduly prejudicial to Waymo.

23 Permitting Uber to call Waymo’s experts at trial will substantially prejudice the jury
 24 against Waymo. Forcing Waymo’s experts to testify fails Federal Rule of Evidence 403’s
 25 balancing test. Allowing a party to call the retained expert of the opposing party should only
 26 occur when there is no other expert who can provide the jury with similar evidence. *See*

27 ¹ French and Hartley are rebuttal witnesses.
 28

1 *e.g. Agron v. Trustees of Columbia Univ. in City of New York*, 176 F.R.D. 445, 450 (S.D.N.Y.
 2 1997) (distinguishing its decision to require only a limiting instruction restricting the defendant
 3 from mentions of the expert's prior retention by the plaintiff on the basis that the expert's
 4 testimony was unique). Where, as here, Uber has its own retained experts that have offered
 5 opinions on the same issues as Waymo's experts, the issues on which Uber would offer Waymo's
 6 experts to testify about would be duplicative of the issues Defendants' experts will testify about.
 7 The fact that a particular expert was originally retained by Waymo is far too prejudicial to risk a
 8 limiting instruction. "It may be possible to keep this explosive fact from the jury at trial, but there
 9 seems little reason to require the effort if other expert witnesses are available." *Rubel v. Eli Lilly &*
 10 *Co.*, 160 F.R.D. 458, 461 (S.D.N.Y. 1995) (citing 8 C. Wright, A. Miller & R. Marcus, Federal
 11 Practice and Procedure: Civil § 2032, at 447 (1994)); see also *Jasty v. Wright Med. Tech., Inc.*,
 12 528 F.3d 28 (1st Cir. 2008)(upholding the district court's decision to not compel defendant's
 13 expert to testify because there was an "absence of any showing of a need for [the plaintiff] to call
 14 the witness"); *Peterson v. Willie*, 81 F.3d 1033, n.4 (11th Cir. 1996) ("While it may generally be
 15 possible to permit a party to call a witness without disclosing the fact of his or her prior
 16 engagement by the opposing party, there may be little reason to require this effort if other expert
 17 witnesses are readily available.). Here, Uber's own expert witnesses are available to testify. It
 18 would be unduly prejudicial for Uber to call Waymo's experts as witnesses and inform the jury
 19 that they are Waymo's witnesses. If they have already testified in Waymo's case, then this will
 20 already be clear to the jury. Since Uber has its own experts opining on these same issues—albeit
 21 taking differing views—there is no substantial need for Uber to rely on Waymo's experts. Uber
 22 should be precluded from doing so.

23 **Justin Suhr (Uber's Witness List):** Uber discloses Justin Suhr as a trial witness to testify
 24 "regarding Stroz due diligence for the Uber/Ottomotto acquisition; Uber's decision to acquire
 25 Ottomotto and structure of the acquisition; and confirmation of the absence of evidence of trade
 26 secret misappropriation through and during compliance with the Court's provisional remedy
 27 order." Waymo objects to Mr. Suhr as a trial witness to the extent that Uber does not make him
 28 available for deposition before trial. Uber did not make him available for deposition during fact

1 discovery. If Uber agrees to make Mr. Suhr available for deposition before trial, Waymo will take
 2 his deposition and withdraw its objection. Indeed, Waymo included Mr. Suhr on its own Witness
 3 List and intends to request his deposition in light of the recently-produced Stroz report and related
 4 documents. Uber, however, should not be permitted to affirmatively rely on Mr. Suhr's testimony
 5 if he is not deposed before trial.

6 Because Uber and Otto Trucking in particular disclosed a large number of witnesses in
 7 their June 21 Supplemental Initial Disclosures, on August 3, with the assistance of Special Master
 8 Cooper, the parties agreed to identify those witnesses on their initial disclosures who they did not
 9 intend to rely upon at trial. Uber identified those witnesses it would not rely on and committed to
 10 provide deposition dates for the remaining witnesses. (Ex. 1 – 8/4/17 Email from E. Takashima.)
 11 Uber did not sufficiently narrow its list, however, and Waymo again asked that the list be
 12 narrowed so that Waymo could realistically depose all of the witnesses on Uber's initial
 13 disclosures. Waymo further noted that if Uber refused to do so, Waymo would take the position
 14 that Uber is precluded from calling those outstanding witnesses at trial. (Ex. 2 – 8/7/17 Email
 15 from A. Roberts.) Uber responded by offering deposition dates for witnesses not yet deposed, but
 16 never offered a date for Mr. Suhr. Waymo understood that to mean that Uber would not rely on
 17 Mr. Suhr at trial. Accordingly, if Uber intends to do so, it should make Mr. Suhr available for
 18 deposition before trial, as he should have been during fact discovery. Otherwise, Uber should be
 19 precluded from affirmatively relying on his testimony at trial.

20 **Larry Page (Otto Trucking and Uber's Witness Lists):** Both Otto Trucking and Uber
 21 disclosed Larry Page on their Witness Lists. Defendants should be precluded from calling
 22 Alphabet's CEO and Google co-founder as a trial witness. Mr. Page was deposed in the case and
 23 does not have unique and personal knowledge of the facts at issue and the evidence Defendants
 24 seek to present can be presented through less intrusive methods. *Celerity, Inc. v. Ultra Clean*
 25 *Holding, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) (explaining the
 26 standard for seeking an apex deposition). The subject matter of the testimony Defendants intend
 27 to present from Mr. Page is duplicative of testimony that they can present through other, non-apex
 28

1 witnesses. Much of the subject matter of his proposed testimony is also irrelevant and/or within
2 the scope of pending Motions *in Limine*.

3 Otto Trucking says that Mr. Page will testify regarding development and operation of
4 Waymo's autonomous vehicle program. All parties have several engineers on their Witness Lists
5 that can cover the same subject matter. Further, Defendants included on their list Sebastian Thrun,
6 who led the Chauffeur effort at Google, to testify on the same subject matter. Otto Trucking also
7 says that Mr. Page will testify regarding Levandowski's departure from Waymo; again, several
8 other witnesses on the parties' Witness Lists are identified to provide testimony about this,
9 including several Uber employees, John Krafcik, and Chris Urmson. And finally, Otto Trucking
10 says that Mr. Page will testify regarding "side businesses." As Waymo previously explained,
11 argument, evidence, or testimony about "side businesses" should be precluded. (Dkt. 851.) It is
12 not relevant and is likely to confuse the jury. Whether Levandowski was permitted to start "side
13 businesses" has no bearing on whether he stole Waymo trade secrets and whether Defendants
14 misappropriated Waymo trade secrets. If Defendants are permitted to introduce argument,
15 evidence, or testimony regarding "side businesses", there is a risk that the jury will be misled and
16 confused into thinking Levandowski's conduct at issue in this case was approved—it was not.
17 Even if permitted, however, Defendants disclosed several other witnesses to testify on this subject
18 matter, including John Krafcik, Sebastian Thrun, Chris Urmson, and Dmitri Dolgov.

19 Uber says that Mr. Page will testify on this same subject matter, as well as about Waymo's
20 business plans, knowledge of discussions with Defendants regarding a partnership in the self-
21 driving vehicle/ride-sharing space, knowledge of the Chauffeur Bonus Plan, and concerns about
22 competition from others. Much of this subject matter is subject to pending Motions *in Limine*:
23 Waymo's Renewed Motion *in Limine* No. 1 and Waymo's Motion *in Limine* No. 15. Even if this
24 subject matter is permitted, however, there are many witnesses on both sides' Witness Lists who
25 can testify about these issues, such as Dan Chu, Defendants' witnesses, and several witnesses with
26 information about the Chauffeur Bonus Plan. There is no need for Defendants to burden Mr. Page
27 and Alphabet by having Mr. Page called to testify at trial on subject matter that can be provided by
28 any number of witnesses.

1 **Sergey Brin (Uber's Witness List):** Uber also disclosed Sergey Brin on its Witness List.
 2 Defendants should be precluded from calling Alphabet's President and Google-co-founder as a
 3 trial witness. Mr. Brin was also deposed in the case and does not have unique and personal
 4 knowledge of the facts at issue and the evidence Defendants seek to present can be presented
 5 through less intrusive methods. *Celerity*, No. C 05-4374, 2007 WL 205067, at *3. The subject
 6 matter of the testimony Defendants intend to present from Mr. Brin is duplicative of testimony
 7 that they can present through other, non-apex witnesses. Indeed, Uber says he will testify on
 8 topics that are identical to those disclosed for Mr. Page. As discussed above, there are other
 9 witnesses who can present this testimony. Further, as discussed above, much of the subject matter
 10 of Mr. Brin's proposed testimony is also irrelevant and/or within the scope of pending Motions *in*
 11 *Limine*. There is no need for Defendants to burden Mr. Brin and Alphabet by having Mr. Brin
 12 called to testify at trial on subject matter that can be provided by any number of witnesses.

13 **Anthony Levandowski (Uber's Witness List):** Uber disclosed Anthony Levandowski to
 14 testify on several issues. Uber cannot use Levandowski's assertion of the Fifth Amendment
 15 privilege as a shield and then call Levandowski to trial to try to benefit from an adverse
 16 inference. This has been Uber's *modus operandi* throughout the case—hiding behind both
 17 Levandowski's Fifth Amendment privilege and alleged common interest privileges except when
 18 beneficial to Uber. The Court recognized an example of Uber's gamesmanship in this regard at the
 19 August 16 hearing on Waymo's motion, related to Defendants' belated disclosure of Mr.
 20 Levandowski's purported destruction of the five discs of downloaded Waymo files in March 2016,
 21 calling Uber's conduct a "slick" practice. (Dkt. 1261 at 44:13-45:3.) Since that hearing,
 22 Defendants have continued this improper practice – selectively relying on helpful communications
 23 with Mr. Levandowski, while concealing those they decide would hurt their litigation position.

24 As Waymo laid out in its Supplemental Brief on its Motion for Order to Show Cause (Dkt.
 25 1502), Uber has coordinated with Levandowski to get help in the case, but relied upon privilege
 26 assertions to avoid revealing discovery into the nature or scope of that cooperation. For example,
 27 calendar invitations show that Levandowski participated in meetings with Uber executives and
 28 attorneys to discuss litigation strategy well after he plead the Fifth Amendment and purportedly

1 refused to cooperate with Uber's investigation. Similarly, at Levandowski's August 22
2 deposition, Uber's counsel asked him questions purporting to demonstrate his refusal to cooperate,
3 and he refused to answer. But, when **Waymo** asked questions about this purported non-
4 cooperation, Uber instructed him not to answer on privilege grounds. Uber cannot have it both
5 ways, picking and choosing when its communications with Levandowski are protected by
6 common interest privileges, and when those communications or non-responses about those
7 communications can be used against Waymo.

8 Now, after a long history of picking and choosing which communications are privileged
9 and which are not, Uber wants to call Levandowski as a witness at trial and ask questions, which
10 will presumably not be answered, so that Uber can get an adverse inference. This is not fair and
11 another classic example of improperly using a privilege assertion as a sword and a shield. This
12 Court should not permit Uber to call Levandowski as a witness and affirmatively rely on adverse
13 inferences taken from his refusal to testify.

14 **David Drummond (Uber's Witness List):** Uber disclosed David Drummond to testify by
15 deposition only. Waymo reserves the right to call Mr. Drummond in relation to Uber's designated
16 testimony.

17
18 DATED: September 20, 2017

QUINN EMANUEL URQUHART & SULLIVAN,
LLP

19
20 By /s/ Charles K. Verhoeven

Charles K. Verhoeven
Attorneys for WAYMO LLC

Exhibit 1

Andrea P Roberts

From: Edward Takashima <etakashima@BSFLLP.com>
Sent: Friday, August 04, 2017 3:06 PM
To: DG-GP Otto Trucking Waymo; QE-Waymo
Cc: BSF_EXTERNAL_UberWaymoLit; UberWaymoMoFoAttorneys
Subject: Waymo v. Uber: Initial Disclosures and Depositions

Counsel,

As we agreed yesterday, please see below Uber's and Ottomotto's list of parties on their initial disclosures who (a) have not yet been deposed in general discovery, and whose depositions have not been scheduled or requested; and (b) Uber and Ottomotto do not presently intend to rely on at trial. As discussed, we reserve our rights to revise this list, with prompt notice to all parties. We are working on deposition dates for other Uber/Ottomotto witnesses on our disclosures who have not been deposed or scheduled.

Eric Amdursky
Alisa Baker
Shouvik Biwas
Judith Branham
Esther Chang
Felipe Corredor
Robert Doll
Jim Gasbarro
Andrew Glickman
Jordan Jaffe
Sameer Kshirsagar
Melanie Maugeri
John McCauley
Dan Muino
Jeff Nardinelli
Jared Newton
Radu Raduta
Wendy Ray
Sylvia Rivera
Paul Sieben
Lyft

Edward H. Takashima

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Exhibit 2

Andrea P Roberts

From: Andrea P Roberts
Sent: Monday, August 07, 2017 8:41 PM
To: John Cooper; Matthew Cate; UberWaymoMoFoAttorneys;
BSF_EXTERNAL_UberWaymoLit@bsfllp.com; DG-
GPOttoTruckingWaymo@goodwinlaw.com
Cc: QE-Waymo
Subject: Waymo v. Uber: Narrowing of Initial Disclosures

John and Counsel,

I write regarding the remaining deposition schedule and the parties' "narrowing" of their Initial Disclosures on Friday. Defendants did not meaningfully narrow the list of witnesses they may call at trial. Defendants should further "narrow" their Initial Disclosures so that we know which witnesses should be deposed.

Of the depositions scheduled/requested in "normal" discovery thus far, 42 were noticed by Uber and 31 (33 including Bonderman and Huffington) were noticed by Waymo. Following Friday's identification of witnesses on which the parties do not presently intend to rely at trial, there are still 13 witnesses on Uber's Initial Disclosures who are not yet scheduled to be deposed and who Uber says it may rely upon at trial: Adam Kenvarg, William Treichler, Florin Ignatescu, Asheem Linaval, Michael Karasoff, Matthew Palomar, Daniel Ratner, George Lagui, Rhian Morgan, Justin Suhr, Mary Fulginiti, Kevin Faulkner, Jiajun Zhu, and Dave Ferguson, as well as a long list of various third party companies. There are still 17 witnesses on Otto Trucking's Initial Disclosures who are not yet scheduled to be deposed and who Otto Trucking says it may rely upon at trial: Kevin Faulkner, Rhian Morgan, Sameer Kshirsagar, Asheem Linaval, Velodyne LiDAR, Eric Berdinis, Claire Delauney, Drew Gray, Matt Grigsby, Oleg Khainovski, Yevgeni Litvin, David Weikersdorfer, Sachin Patil, Eyal Cohen, Robert Miller, Seval Oz, David Estrada, and various other third parties. By contrast, there are only 3 witnesses on Waymo's Corrected Initial Disclosures who are not yet scheduled to be deposed and who Waymo currently plans to rely on at trial.

Defendants should further narrow their lists. It is inconceivable that they continue to believe that they will rely on all of these witnesses at trial. If Defendants refuse to provide a more narrow list so that Waymo can realistically depose all potential trial witnesses before the fact discovery cut off, then we will take the position that Defendants are precluded from calling the witnesses listed above at trial.

John, we would like to address this on a meet and confer tomorrow at 11:30.

Thanks,
Andrea

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